

\*E-Filed 5/28/10\*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

DAVID B. PORTEE,  
Plaintiff,

v.

COUNTY OF SANTA CLARA, et al.,  
Defendants.

No. C 08-3566 RS (PR)

**ORDER OF SERVICE;**

**DIRECTING DEFENDANTS TO FILE  
DISPOSITIVE MOTION OR NOTICE  
REGARDING SUCH MOTION;**

**INSTRUCTIONS TO CLERK**

This is a federal civil rights action filed by a *pro se* state prisoner pursuant to 42 U.S.C. § 1983 against defendants Bert Caro and James Norris for unlawfully destroying evidence which may have exonerated plaintiff. The Court now reviews the complaint pursuant to 28 U.S.C. § 1915A(a).

**DISCUSSION**

**A. Standard of Review**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of it, if the complaint “is frivolous, malicious, or fails to state a claim upon which

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1 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such  
2 relief.” *Id.* § 1915A(b). Pro se pleadings must nonetheless be liberally construed. *Balistreri*  
3 *v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that  
5 a right secured by the Constitution or laws of the United States was violated, and (2) that the  
6 alleged violation was committed by a person acting under the color of state law. *West v.*  
7 *Atkins*, 487 U.S. 42, 48 (1988).

#### 8 **B. Legal Claims**

9 Plaintiff alleges that defendants Bert Caro, an investigator with the San Jose Police  
10 Department, and James Morris, a criminalist with the San Jose Police Department, violated  
11 plaintiff’s right to due process and to be free from cruel and unusual punishment by  
12 destroying evidence that may have exonerated him. Liberally construed, plaintiff’s claims  
13 are cognizable under § 1983.

### 14 **CONCLUSION**

15 For the foregoing reasons, the Court orders as follows:

16 1. The Clerk of the Court shall issue summons and the United States  
17 Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all  
18 attachments thereto, and a copy of this order upon the following defendants at the San Jose  
19 Police Department: Bert Caro, an investigator, and James Norris, a criminalist. The Clerk  
20 shall also mail courtesy copies of the complaint and this order to the California Attorney  
21 General’s Office.

22 3. No later than ninety (90) days from the date of this order, defendants shall file  
23 a motion for summary judgment or other dispositive motion with respect to the claims in the  
24 amended complaint found to be cognizable above.

25 a. If defendants elect to file a motion to dismiss on the grounds plaintiff  
26 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),  
27 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*,  
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1 315 F.3d 1108, 1119–20 (9th Cir. 2003), cert. denied *Alameida v. Terhune*, 540 U.S. 810  
2 (2003).

3           b. Any motion for summary judgment shall be supported by adequate  
4 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of  
5 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor  
6 qualified immunity found, if material facts are in dispute. If any defendant is of the opinion  
7 that this case cannot be resolved by summary judgment, he shall so inform the Court prior to  
8 the date the summary judgment motion is due.

9           4. Plaintiff's opposition to the dispositive motion shall be filed with the Court and  
10 served on defendants no later than forty-five (45) days from the date defendants' motion is  
11 filed.

12           a. In the event the defendants file an unenumerated motion to dismiss  
13 under Rule 12(b), plaintiff is hereby cautioned as follows:

14           The defendants have made a motion to dismiss pursuant to Rule 12(b) of the  
15 Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative  
16 remedies. The motion will, if granted, result in the dismissal of your case. When a party you  
17 are suing makes a motion to dismiss for failure to exhaust, and that motion is properly  
18 supported by declarations (or other sworn testimony) and/or documents, you may not simply  
19 rely on what your complaint says. Instead, you must set out specific facts in declarations,  
20 depositions, answers to interrogatories, or documents, that contradict the facts shown in the  
21 defendant's declarations and documents and show that you have in fact exhausted your  
22 claims. If you do not submit your own evidence in opposition, the motion to dismiss, if  
23 appropriate, may be granted and the case dismissed.

24           b. In the event defendants file a motion for summary judgment,  
25 the Ninth Circuit has held that the following notice should be given to plaintiffs:

26           The defendants have made a motion for summary judgment by which they  
27 seek to have your case dismissed. A motion for summary judgment under Rule 56 of the  
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1 Federal Rules of Civil Procedure will, if granted, end your case.

2 Rule 56 tells you what you must do in order to oppose a motion for summary  
3 judgment. Generally, summary judgment must be granted when there is no genuine issue of  
4 material fact — that is, if there is no real dispute about any fact that would affect the result  
5 of your case, the party who asked for summary judgment is entitled to judgment as a matter  
6 of law, which will end your case. When a party you are suing makes a motion for summary  
7 judgment that is properly supported by declarations (or other sworn testimony), you cannot  
8 simply rely on what your complaint says. Instead, you must set out specific facts in  
9 declarations, depositions, answers to interrogatories, or authenticated documents, as provided  
10 in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents  
11 and show that there is a genuine issue of material fact for trial. If you do not submit your  
12 own evidence in opposition, summary judgment, if appropriate, may be entered against you.  
13 If summary judgment is granted in favor of defendants, your case will be dismissed and there  
14 will be no trial. *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff  
15 is advised to read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v.*  
16 *Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward  
17 with evidence showing triable issues of material fact on every essential element of his claim).  
18 Plaintiff is cautioned that failure to file an opposition to defendants' motion for summary  
19 judgment may be deemed to be a consent by plaintiff to the granting of the motion, and  
20 granting of judgment against plaintiff without a trial. *See Ghazali v. Moran*, 46 F.3d 52,  
21 53-54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

22 5. Defendants shall file a reply brief no later than fifteen (15) days after plaintiff's  
23 opposition is filed.

24 6. The motion shall be deemed submitted as of the date the reply brief is due. No  
25 hearing will be held on the motion unless the Court so orders at a later date.

26 7. All communications by the plaintiff with the Court must be served on  
27 defendants, or defendants' counsel once counsel has been designated, by mailing a true copy  
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1 of the document to defendants or defendants' counsel.

2 8. Discovery may be taken in accordance with the Federal Rules of Civil  
3 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local  
4 Rule 16-1 is required before the parties may conduct discovery.

5 9. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
6 court informed of any change of address and must comply with the court's orders in a timely  
7 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute  
8 pursuant to Federal Rule of Civil Procedure 41(b).

9 10. Extensions of time must be filed no later than the deadline sought to be  
10 extended and must be accompanied by a showing of good cause.

11 **IT IS SO ORDERED.**

12 DATED: May 27, 2010

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14 RICHARD SEEBORG  
15 United States District Judge  
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